MAYBAN ALLIED BHD

v.

KENNETH GODFREY GOMEZ & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
HISHAMUDIN MOHD YUNUS JCA
RAMLY ALI JCA
[CIVIL APPEAL NOS: W-02-1094-2008 & W-02-1095-2008]
5 JANUARY 2010

CIVIL PROCEDURE: *Estoppel - Consent judgment - Parties reaching compromise - Plaintiff withdrawing action without liberty to file afresh - Defendants withdrawing counterclaim - Consent judgment striking out action entered pursuant to such compromise - Plaintiff later filing identical second action - Effect of such consent judgment - Whether plaintiff estopped from commencing second action - Whether plaintiff's second action ought to be struck out and/or dismissed*

CIVIL PROCEDURE: *Judgments and orders - Consent judgment - Parties reaching compromise - Plaintiff withdrawing action without liberty to file afresh - Defendants withdrawing counterclaim - Consent judgment striking out action entered pursuant to such compromise - Plaintiff later filing identical second action - Effect of such consent judgment - Whether plaintiff estopped from commencing second action - Whether second action was res judicata - Whether consent judgment capable of giving rise to res judicata - Whether court ought to give effect to the consent judgment - Whether plaintiff's second action ought to be struck out and/or dismissed*

CIVIL PROCEDURE: *Res judicata - Abuse of process of court - Parties reaching compromise - Plaintiff withdrawing action without liberty to file afresh - Defendants withdrawing counterclaim - Consent judgment striking out action entered pursuant to such compromise - Plaintiff later filing identical second action - Effect of such consent judgment - Whether second action was res judicata - Whether plaintiff's second action an abuse of court's process - Whether plaintiff's second action ought to be struck out and/or dismissed*

CIVIL PROCEDURE: *Limitation of action - Contract - Limitation period - Whether six years from date of accrual of cause of action - Limitation Act 1953, s. 6(1)(a)*

A ***LIMITATION:*** *Accrual of cause of action - Contract - Action based on contract -Whether six years from date of accrual of cause of action - Limitation Act 1953, s. 6(1)(a)*

The plaintiff filed an action against the defendants – the partners
B of a law firm – on 27 November 2002 to recover auction proceeds in respect of a property auctioned on 11 November 1996 ('the first suit'). On 25 August 2003, the plaintiff withdrew the first suit. The court recorded a consent judgment ordering the plaintiff's first suit and the defendants' counterclaim be struck out, and directing the
C parties to file a notice of discontinuance within one week. The court also ordered costs to be agreed between the parties. However, on 21 October 2004, the plaintiff filed a second action – the instant action – against the defendants to recover the same auction proceeds. The plaintiff's claims in both the first and second actions
D were identical. The defendants' application to strike out the second action was allowed by the High Court. The plaintiff appealed to the Court of Appeal. In resisting the appeal, the defendants claimed *res judicata* and limitation.

E **Held (dismissing the appeal with costs)**
Per Ramly Ali JCA:

(1) A consent order can give rise to *res judicata*. In the instant case, the plaintiff had made representations to the defendants that it intended to withdraw its action 'without the liberty to
F file afresh' with no order as to costs. On that understanding the defendants agreed to withdraw their counterclaim against the plaintiff. The draft notice of discontinuance, the notes of proceedings and the consent order also showed that the plaintiff had withdrawn its action without the liberty to file afresh.
G There was clear representation that there would be closure to the matter. The doctrine of estoppel would apply in the instant case and estop the plaintiff from filing the second action against the defendants. To allow the plaintiff to file a fresh action (the 2nd action) based on the same facts or substantially
H the same facts would be unjust and grossly prejudicial to the defendants particularly when the counterclaim against the plaintiff had been withdrawn by the defendants. (paras 19-25)

(2) If an order is made pursuant to the terms of a settlement to
I dismiss or strike out an action by consent, the effect is not only to put an end to that action but also to preclude the plaintiff from bringing fresh proceedings based on the same cause of action. It operates as a judgment against the plaintiff

and acts as an estoppel by record. In the instant case there was a compromise between the parties which culminated in a consent order being recorded by the Senior Assistant Registrar before whom both parties were duly represented by counsel. The court had therefore to give full recognition to the consent order. To allow the plaintiff to proceed with the second action was clearly an abuse of the process of the court. (paras 26 & 27)

(3) The matter was *res judicata* and the plaintiff's appeal was clearly without merit and ought to be dismissed. (para 28)

(4) The plaintiff's cause of action in both actions was based on contract. The limitation period was thus six years from the date of accrual of the cause of action. The instant second action was filed more than six from the date of accrual of the cause of action. The action was thus time barred and ought to be struck out for being an abuse of the process of court. (paras 31-34)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif memfailkan suatu tindakan terhadap defendan-defendan – pekongsi-pekongsi sebuah firma undang-undang – pada 27 November 2002 untuk mendapat balik hasil lelong berhubung dengan suatu hartanah yang dilelongkan pada 11 November 1996 ('guaman pertama'). Pada 25 Ogos 2003, plaintif menarik balik guaman pertama. Mahkamah mencatatkan satu penghakiman persetujuan yang mengarahkan guaman pertama plaintif dan tuntutan balas defendan-defendan dibatalkan, dan mengarahkan pihak-pihak memfailkan suatu notis pemberhentian dalam masa satu minggu. Mahkamah juga mengarahkan kos untuk disetujui di antara pihak-pihak. Walau bagaimanapun, pada 21 Oktober 2004, plaintif memfailkan tindakan kedua – tindakan semasa – terhadap defendan-defendan untuk mendapat balik hasil jualan yang sama. Tuntutan-tuntutan plaintif dalam kedua-dua tindakan pertama dan kedua adalah sama. Permohonan defendan-defendan untuk membatalkan tindakan kedua telah dibenarkan oleh Mahkamah Tinggi. Plaintif merayu ke Mahkamah Rayuan. Dalam menentang rayuan, defendan-defendan mendakwa *res judicata* dan had masa.

Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMR:

(1) Suatu perintah persetujuan boleh menimbulkan *res judicata*. Dalam kes semasa, plaintif membuat representasi kepada defendan-defendan bahawa ia berniat untuk menarik balik

A tindakannya 'tanpa kebebasan untuk memfailkan semula' tanpa apa-apa perintah mengenai kos. Atas pefahaman itu defendan-defendan bersetuju menarik balik tuntutan balas mereka terhadap plaintif. Notis draf pemberhentian, nota-nota prosiding dan perintah persetujuan juga menunjukkan bahawa plaintif telah
B menarik balik tindakannya tanpa kebebasan untuk memfailkan semula. Terdapat representasi yang jelas bahawa perkara itu akan ditamatkan. Doktrin estoppel akan digunapakai dalam kes semasa dan akan estop plaintif dari memfailkan tindakan kedua terhadap defendan-defendan. Untuk membenarkan plaintif untuk
C memfailkan semula (tindakan kedua) berdasarkan fakta-fakta yang sama atau sama secara substans adalah tidak adil dan amat memprejudiskan kepada defendan-defendan terutamanya apabila tuntutan balas terhadap plaintif telahpun ditarik balik oleh defendan-defendan.

D

(2) Jika suatu perintah dibuat mengikut terma-terma sesuatu penyelesaian untuk menolak atau membatalkan suatu tindakan melalui persetujuan, efeknya bukan sahaja akan menamatkan tindakan tersebut tetapi juga untuk menghalang plaintif dari
E membawa prosiding baru berdasarkan kausa tindakan yang sama. Ia bertindak sebagai satu penghakiman terhadap plaintif dan sebagai suatu estoppel melalui pencatatan. Dalam kes semasa terdapat kompromi di antara pihak-pihak yang mengakhiri dengan suatu perintah persetujuan dicatatkan oleh Penolong
F Pendaftar Kanan yang di depannya kedua-dua pihak telah diwakili oleh peguam. Mahkamah oleh itu mesti memberi pengiktirafan penuh kepada perintah persetujuan tersebut. Untuk membenarkan plaintif untuk meneruskan dengan tindakan kedua adalah jelas suatu penyalahgunaan proses mahkamah.

G

(3) Perkara tersebut adalah *res judicata* dan rayuan plaintif jelas tanpa merit dan perlu ditolak.

(4) Kausa tindakan plaintif dalam kedua-dua tindakan adalah berasaskan kontrak. Had masa jangka masa oleh yang demikian
H adalah enam tahun dari tarikh permulaan kausa tindakan tersebut. Tindakan tersebut oleh itu dihadkan oleh masa dan seharusnya dibatalkan disebabkan ia suatu penyalahgunaan proses mahkamah.

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Case(s) referred to:

Abdul Hamid Rahmat & Anor v. Development & Commercial Bank Bhd & Anor [1993] 1 CLJ 35 HC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Cohen v. Fonesco [1926] 1 KB 119 ***(refd)***

Gasing Heights Sdn Bhd v. Aloyah Abdul Rahman & Ors [1996] 3 CLJ 695 HC ***(refd)***

Jamir Hassan Najir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Malaysian National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC

Othman & Anor v. Mek [1972] 1 LNS 103 FC ***(refd)***

Palmer & Anor v. Durnford Ford (a firm) & Anor [1992] 2 All ER 122 ***(refd)***

Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Re South American & Mexican Co ex p Bank of England [1895] 1 Ch 37 ***(refd)***

Legislations referred to:

Limitation Act 1953, s. 6(1)(a)

Rules of the High Court 1980, O. 18 r. 19(1)

Other source(s) referred:

Dismissal by Consent, in Atkins, vol 10, p 46

Halsbury's Laws of England, 4th edn, vol 28, paras 820, 847

(Civil Appeal Nos: W-02-1094-2008 & W-02-1095-2008)

For the appellant - Lambert Rosa-Ratnam (CS Mong & Nicole Leong with him); M/s Lee Hishamuddin Allen & Gledhill

(Civil Appeal No: W-02-1094-2008)

For the respondents - Zainur Zakaria; M/s Sabarudin Othman & Ho

(Civil Appeal No: W-02-1095-2008)

For the respondents - Indran Kumaraguru; M/s Krishna Dallumah Maniam & Indran

[Appeals from High Court, Kuala Lumpur; Civil Suit No: S6-22-1600-2004]

Reported by Andrew Christopher Simon

A

JUDGMENT

Ramly Ali JCA:

[1] The plaintiff (the appellant in the present appeal) is a company that has taken over the assets of the Co-operative Central Bank Limited (CCB). The defendants (the respondents in the present appeal) are all partners and advocates and solicitors practising under the firm name of M/s. Nordin Hamid & Co during the period when the plaintiff's alleged cause of action arose.

[2] The appellant's claim against the respondents is for the return of auction proceeds allegedly kept by the Kuala Lumpur office of M/s. Nordin Hamid & Co pursuant to a the foreclosure proceeding in Originating Summons No. S6-31-3262-1987 wherein a property was auctioned on 11 November 1996 for the sum of RM385,000. On or about 18 November 1997 the sum of RM377,350 was allegedly paid to the Kuala Lumpur office of M/s. Nordin Hamid & Co. It is the contention of the defendants that they were not aware of this payment into the firm's client's account at this date.

[3] On 27 November 2002, the appellant brought an action (Kuala Lumpur High Court Suit No. D1-22-1943-2002) against the respondents to recover the auction proceeds (1st suit).

[4] On 25 August 2003, the appellant withdrew the 1st suit. The withdrawal of the 1st suit was recorded in the notes of proceeding for that suit. The notes of proceeding for 25 August 2003 show that the court ordered the 1st suit and the firm's counterclaim be struck out, and the parties were directed to file a notice of discontinuance within one week. The court also ordered costs be agreed between the parties.

[5] After the 1st suit was withdrawn, the plaintiff on 21 October 2004 filed the present action (the subject matter of the present appeal) against the partners of the firm to recover the same auction proceeds. The appellant's claims in both the 1st and 2nd suits are identical.

[6] On 18 February 2005, the respondents filed applications to strike out the 2nd suit under O. 18 r. 19(1) of the Rules of the High Court 1980, on the ground of *res judicata.* The respondents in the 1st appeal (Appeal No. W-02-1094-2008) also relied on limitation period in applying to strike out the 2nd suit. On 29 August 2008, the learned judge struck out the 2nd suit. Hence the present appeals.

Appellants Arguments

[7] The appellant argued that the 2nd suit is not barred by *res judicata* as it was withdrawn without the merits being heard or adjudicated by the court. To the appellant, cause of action estoppel and issue estoppel do not apply on the facts of this matter.

[8] The appellant also argued that the 2nd suit is not barred by limitation; and the facts necessary for a considered decision on whether the 2nd suit is time barred have to be determined at trial. Thus the appellant concluded that this is not a plain and obvious case to be summarily struck out.

Respondents' Arguments

[9] The respondents on the other hand, took the position that since the 1st suit was withdrawn by the appellant by way of a consent order, this fact by itself has given rise to two (2) grounds for striking out ie, *res judicata* or issue estoppel and limitation period which are legal issues arising from the same set of facts. The respondents claimed that the appellant's own pleadings state that their cause of action arose on or about 1 December 1997 and would therefore have expired on 30 November 2003, whereas the 2nd suit was filed on 21 October 2004.

Findings Of The Court

[10] Under O. 18 r. 19(1) of the Rules of the High Court 1980, the court may at any stage of the proceedings order to be struck out any statement of claim and writ summons in an action on the ground that it discloses no reasonable cause of action; it is scandalous, frivolous or vexatious; or it is otherwise an abuse of the process of the court.

[11] In the present case, the court finds that the principles that are applicable for the striking out of the 2nd suit are:

(a) *res judicata*; and

(b) limitation.

Issue Of *Res Judicata*

[12] In determining whether a statement of claim discloses a reasonable cause of action or itself constitutes an abuse of process, the state of affairs to which the court must have regard is that which prevailed at the date the action is filed. (see: Court of Appeal

A decision in *Gasing Heights Sdn. Bhd v. Aloyah Abdul Rahman & Ors.* [1996] 3 CLJ 695). The court is entitled to look at the history of the case, where there is likelihood of the action being *res judicata*, to determine if there is a cause of action (see: *Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 B and *Abdul Hamid Rahmat & Anor v. Development & Commercial Bank Bhd & Anor* [1993] 1 CLJ 35).

[13] The plea of *res judicata* applies not only to points which the court was required to form an opinion on but also to every point C in the litigation which the parties could have brought up at the time. (see: *Othman & Anor. v. Mek* [1972] 1 LNS 103).

[14] In addition, the court possesses an inherent jurisdiction to prevent an abuse of its process (see: *Raja Zainal Abidin Raja Haji Tachik & Ors. v. British-American Life & General Insurance Bhd* [1993] D 3 CLJ 606 – Supreme Court). The use of the court process must be *bona fide.*

[15] When a matter between two parties has been adjudicated and determined by a court of competent jurisdiction, they and their E privies are not permitted to litigate once more the *res judicata* as the determination or judgment becomes the truth between such parties. An estoppel for *rem judicatum* has been created as a result (per Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783). The cause of action estoppel prevents F reassertion of a cause of action which has been determined in a final judgment by the same parties in a subsequent proceeding. The court has the inherent jurisdiction to dismiss or strike out an action on the ground of *res judicata*.

G **[16]** In the present case, the statement of claim that was filed by the appellant in the 1st suit and the statement of claim filed in the 2nd suit asked for the same remedy ie, for damages and the refund of the action proceeds. Both statements of claim in both the 1st and 2nd suits are in substance identical, resting on the same facts H and issues.

[17] In respect of the 1st suit, the appellant and the respondent entered into a consent judgment or order dated 25 August 2003 to the effect *inter alia* that "ADALAH JUGA DIPERINTAHKAN I SECARA PERSETUJUAN bahawa tindakan ini dibatalkan dan kos dipersetujui di antara kedua-dua pihak dan jikalau kos tidak dapat dipersetujui oleh kedua-dua pihak ianya ditaksirkan."

[18] There is no mention about the 1st suit being withdrawn "with liberty to file afresh" in the said consent order. A

[19] Before the consent order was recorded on 25 August 2003, the appellant sent a letter dated 12 August 2003 to the defendant to say that the appellant withdrew their application for summary judgment (which was fixed for hearing on 25 August 2003) and ceased all legal actions in respect of the matter "without liberty to file afresh" with no order as to costs. On that understanding the respondents agreed to withdraw the counterclaim filed against the appellant. B C

[20] Subsequent to the above, a draft notice of discontinuance was prepared by the appellant's counsel and approved by the respondents' counsel which reads as follows:

> Ambil perhatian bahawa plaintif yang dinamakan di atas memberhentikan keseluruhan tindakan terhadap defendan tanpa hak kebebasan untuk memfailkan semula terhadap defendan atau kongsi firma tersebut dengan kos yang akan ditaksirkan atau dipersetujui. D

[21] The matter came up for hearing on 25 August 2003 in chambers before the learned Senior Assistant Registrar, Puan Wan Liza bt Md. Amin. The relevant notes of proceeding read as follows: E

> Hari ini untuk pendengaran tuntutan, plaintif pohon tarik balik kerana pihak telah menulis surat pada pihak dengan persetujuan peguamcara … F
>
> Defendan juga memohon menarik balik tuntutan balas.

[22] In the premise, the correspondences and the notes of proceeding clearly show that the 1st suit was withdrawn by the appellant "without liberty to file afresh" with a notice of discontinuance to be filed within one week from the date of the consent order. G

[23] It is trite that a consent order could give rise to a plea of *res judicata*. There are a number of authorities on this point. Among them are: *Palmer & Anor v. Durnford Ford (a firm) & Anor* [1992] 2 All ER 122; *Cohen v. Fonesco* [1926] 1 KB 119, *Re South American & Mexican Co. ex p. Bank of England* [1895] 1 Ch 37; and *Malaysian National Insurance Sdn. Bhd. v. Lim Tiok* [1997] 2 CLJ 351. H I

[24] The consent order in the present case is founded on a contract or agreement between the parties based on both parties' willingness to submit to the discontinuance of the 1st suit on certain terms. Once the appellant and the respondents took the matter beyond contract and recorded a consent order then they must accept all the implications of a court judgment or order. In this sense the court now cannot vary the terms of the order. The application by the respondents for striking out the 2nd suit under O. 18 r. 19 was in effect to enforce the terms of the agreement or contract and the said consent order.

[25] It must be noted that the appellant's letter dated 12 August 2003 to the respondents clearly proposed that the 1st suit be withdrawn "without liberty to file afresh". The respondents' reply to that letter, also affirmed that the said withdrawal was "without liberty to file afresh". The consent order dated 25 August 2003 also made no mention that the 1st suit was withdrawn "with liberty to file afresh". On the above strength and understanding, the respondents also withdrew their counterclaim against the appellant. It was a clear representation that there would be closure of the matter. Thus the doctrine of estoppel as expounded in *Boustead Trading (1985) Sdn. Bhd. v. Arab Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283 is applicable in the present case. The appellant ought to be estopped from filing the 2nd suit against the respondents. In the circumstances, to allow the appellant to file a fresh action (the 2nd suit) based on the same facts or substantially the same facts would be unjust and grossly prejudicial to the respondents particularly when the counterclaim against the appellant had been withdrawn by the respondents.

[26] As clearly stated in the commentary on *Dismissal by Consent, in Atkins* vol. 10 at p. 46, an order of dismissal or striking out can be made by consent. If an order is made pursuant to the terms of settlement, that an action be dismissed or struck out by consent, the effect is not only to put an end to that action but also to preclude the plaintiff from bringing fresh proceedings based on the same cause of action. It operates as a judgment against the plaintiff and acts as an estoppel by record.

[27] In the present case, the appellant had agreed to withdraw their action and the respondents had agreed to withdraw their counterclaim. There was a compromise between these parties which culminated in a consent order being recorded by the learned Senior Assistant Registrar before whom both parties were represented by

their own respective counsel. The court must therefore give full recognition to the consent order. To allow the appellant to proceed with the 2nd suit is clearly an abuse of the process of the court.

[28] Based on the above considerations, the court is satisfied that on this ground of *res judicata* alone, the present appeals are clearly without merit and thus ought to be dismissed.

Issues Of Limitation

[29] For completeness the court shall now deal with the issue of limitation as raised by the respondents in the present appeals.

[30] Section 6(1)(a) of the Limitation Act 1953 provides that an action founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[31] The appellant's claim against the respondents both in the 1st and 2nd suits is founded on contract. Thus the applicable limitation period is six years from the date of the accrual of the cause of action.

[32] In general, in determining the limitation period under the Limitation Act, time begins to run when the cause of action accrues. A cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed. Where the defendant has pleaded that the action is time-barred, the burden is on the plaintiff to prove that the relevant limitation has not expired (see: *Halsbury's Laws of England,* 4th edn. vol. 28, paras 820 and 847).

[33] It is clear from appellant's statement of claim that they regard the dates 18 November 1997 or 1 December 1997 as the cause of action against the respondents in the 1st suit and in this present 2nd suit, since they are specifically claiming damages and interests from this date. It is therefore settled law that for the purpose of the Limitation Act the cause of action against the respondents arose from the date the cause of action accrued which is either 18 November 1997 or 1 December 1997, which has been pleaded by the appellant in the statement of claim.

[34] The present 2nd suit was filed afresh on 21 October 2004 ie, after a period of more than six years from the date on which the cause of action accrued (18 November 1997 or 1 December 1997).

A Thus the limitation of the appellant's 2nd suit has set in. Thus the 2nd suit is time barred. Therefore, the 2nd suit should also be struck out as being an abuse of the process of the court.

Conclusion

B **[35]** For the above reasons, we unanimously dismiss both the appeals (W-02-1094-2008 and W-02-1095-2008) with costs of RM10,000 (for both appeals) to the respondents. The order of the High Court dated 29 August 2009 is affirmed. Deposit to the respondents on account of costs.

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